



June 2, 2003

Policy Brief.....Partial-Birth Abortion Ban

H.R. 760—Partial-Birth Abortion Ban Act of 2003 (Chabot)

Order of Business: The bill is scheduled to be considered the week of June 2, 2003, under a rule that is yet to be determined, with one motion to recommit.

Summary: The Partial-Birth Abortion Ban Act (H.R. 760) makes it illegal in the United States for a physician to perform a partial-birth abortion. Partial-birth abortion is a procedure where a pregnant woman's cervix is forcibly dilated over a three-day time period. On the third day her child is pulled feet first through the birth canal until his or her entire body, except for the head, is outside the womb. The head is held inside the womb by the woman's cervix. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the abortionist inserts scissors into the base of the baby's skull and the scissors are opened, creating a hole in the baby's head. The skull is either then crushed with instruments or a suction catheter is inserted into the hole, and the baby's brain is suctioned out. Since the head is now small enough to slip through the mother's cervix, the now-lifeless body is pulled the rest of the way out of its mother and the baby's corpse is discarded, usually as medical waste.

Three years ago in *Stenberg v. Carhart*, the United States Supreme Court struck down Nebraska's partial-birth abortion ban, which was similar, but not identical, to the previous bans passed by Congress. To address *Stenberg*, the Partial-Birth Abortion Ban Act of 2003 differs from the previous legislation in two ways:

REFUTING THE SUPREME COURT'S CLAIM THAT THE LAW WAS VAGUE:

The five-justice majority in *Stenberg* thought that Nebraska's definition of partial-birth abortion was vague and potentially outlawed a common abortion procedure where an unborn child is pulled apart limb by limb through dismemberment (dilation and evacuation (D&E)) and sometimes the limbs enter into the birth canal. In a D& E, the justices ruling in the majority explained:

“During a pregnancy's second trimester (12 to 24 weeks), the most common abortion procedure is “dilation and evacuation” (D&E), which involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum surgical instruments, and (after the 15th week) the potential need for instrumental dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. **When such dismemberment is necessary, it typically**

occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal”
(emphasis added).

—<http://supct.law.cornell.edu/supct/html/99-830.ZS.html>

To address the Court’s concerns that the definition of partial-birth abortion was vague, H.R. 760 contains a new, more precise, definition of the prohibited procedure:

Definition of Partial-Birth Abortion in H.R. 760:

“The person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.”

Life of the Mother Exception (an exception contained in all previously-passed bans):

“This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”

REFUTING THE COURT’S CLAIM THAT LAW NEEDS A “HEALTH” EXCEPTION:

The Court ruled that the Nebraska ban placed an “undue burden” on women seeking abortions because it failed to include an exception to preserve the “health” of the mother. The Court based its conclusion on the trial court’s factual findings regarding the relative health and safety benefits of partial-birth abortions—findings that were highly disputed. The *Stenberg* Court, however, was required to accept these questionable trial court findings because of the highly deferential “clearly erroneous” standard that is applied to lower court factual findings.

According to the Judiciary Committee, those factual findings are inconsistent with the overwhelming weight of authority on the issue—including evidence received during extensive legislative hearings—which indicate that a partial-birth abortion is never medically necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care. This is supported by the American Medical Association which has said the procedure is “not good medicine” and is “not medically indicated” in any situation.

Although the Supreme Court in *Stenberg* was obligated to accept the district court’s findings, Congress possesses an independent constitutional authority to reach findings of fact. Under well-settled Supreme Court jurisprudence, these congressional findings will be entitled to great deference by the federal judiciary in ruling on the constitutionality of a federal partial-birth abortion ban. Thus, the first section of H.R. 760 contains Congress’s 14 factual findings that, based upon extensive medical evidence compiled during congressional hearings, a partial-birth abortion is never necessary to preserve the health of a woman.

In a “health” emergency, why wait three days?

Some proponents of partial-birth abortion claim the bill needs an exception for the “health” of the mother. In a paper he presented at a September 1992 meeting of the National Abortion Federation, Ohio abortionist Martin Haskell, M.D. described the partial-birth abortion procedure, which he is credited with inventing. The procedure, he said, takes up to three days. If a woman’s health is in danger, why wait three days?

The procedure, he describes, takes three days:

“Day 1—Dilation

... Five, six, or seven large Dilapan hydroscopic dilators are placed in the cervix. The patient goes home or to a motel overnight.”

“Day 2—More Dilation

The patient returns to the operating room where the previous day’s Dilapan are removed. The cervix is scrubbed and anesthetized. Between 15 and 25 Dilapan are placed in the cervical canal. The patient returns home or to a motel overnight.

“Day 3—The Operation

The patient returns to the operating room where the previous day’s Dilapan are removed.” [The procedure is then described in vivid detail]

—Source: Martin Haskell, M.D., "Dilation and Extraction for Late Second Trimester Abortion," in "Second Trimester Abortion: From Every Angle," Fall Risk Management Seminar, September 13-14, 1992, Dallas, Texas, National Abortion Federation.

Entire paper: <http://www.house.gov/burton/RSC/haskellinstructional.pdf>

Possible Motion to Recommit, A Gutting Exception:

In the 107th Congress, Rep. Tammy Baldwin (D-WI) offered a motion to recommit that would have eliminated the defined life of the mother exception and replaced it with a “life or health” exception in “appropriate medical judgment” (left undefined).

Effect of Baldwin Motion to Recommit:

Sec. 1531. Partial-birth abortions prohibited

“(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion ~~that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.~~ **where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.**

Under this modification, the abortionist, himself could make the determination that the partial-birth abortion is to “preserve” the “health” of the mother for any reason. Health was not defined under the motion and under current Supreme Court precedent, health may include “all factors—physical, emotional, psychological, familial, and the woman’s age— relevant to the well-being of the patient.”

Practitioners of partial-birth abortion have testified in court and before Congress that they consider the mother being a teenager, having a fear of open spaces, and depression, among other things, as acceptable reasons for performing this procedure. If the Baldwin motion had been adopted, every abortionist could claim the procedure was done in his judgment for the so-called “health” of the mother, thus gutting the intent of the ban.

Possible Gutting Substitute, A Phony Ban:

It is rumored that a substitute amendment may be made in order on the House floor. This would be the first time the House has voted on a substitute amendment to the Partial Birth Abortion Ban. This substitute is likely to mirror H.R. 809, a bill introduced by Rep. Steny Hoyer (D-MD) and Rep. Jim Greenwood (R-PA.). The Hoyer/Greenwood proposal makes it a federal crime to perform an abortion “after the fetus has become viable,” but “**does not prohibit any abortion if, in the medical judgment of the attending physician**, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman” (emphasis added).

Abortionist determines when he’s guilty of violating ban:

- Just as the Baldwin motion to recommit in 2002 would have allowed every abortionist to claim the partial-birth abortion procedure was done in his judgment for an undefined “health” of the mother, the exception in the Hoyer/Greenwood proposal would allow every abortionist to claim that every abortion procedure was done in his judgment for the so-called “health” of the mother. Again, practitioners of partial-birth abortion have testified in court and before Congress that they consider the mother being a teenager, having a fear of open spaces, and depression, among other things, as acceptable reasons for performing this procedure. Since currently every abortion in the United States is done at the discretion of the abortionist’s judgment, this Hoyer/Greenwood proposal would do nothing to change the status quo and would not outlaw, in practice, a single abortion.

Partial-Birth Abortions Permitted under Expected Substitute:

- Though the Hoyer/Greenwood proposal does not mention partial-birth abortion, if enacted it would apply no restrictions to partial-birth abortions until after an unborn baby is provably “viable” — which abortionists generally claim is in the *seventh month* or even later — even though the majority of partial-birth abortions are performed in the *fifth and sixth months* of pregnancy. The Hoyer/Greenwood proposal would also permit the aborting of provably “viable” unborn babies in the seventh, eighth, and ninth months to enhance the “mental health” of the mother, as the sponsors explicitly confirmed in a “Dear Colleague” dated March 16, 2000, posted at www.nrlc.org/abortion/pba/Phony%20ban%20on%20late-term.pdf

Additional Information:

Legislative History:

104th Congress:

On November 1, 1995, the House first considered the Partial-Birth Abortion Ban Act (H.R. 1833), which passed 288-139 (Roll Call No. 756 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1995&rollnumber=756>)

On December 7, 1995, the ban passed the Senate 54-44, with a few minor modifications. (http://www.senate.gov/legislative/vote1041/vote_00596.html)

On March 27, 1996, the House agreed to the Senate modifications, 286-129, 1 voting present (Roll Call No. 94 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1996&rollnumber=94>)

On April 10, 1996, the Partial-Birth Abortion Ban Act was vetoed by President Bill Clinton.

On September 19, 1996, the House overrode the veto, 285-137 (Roll No. 422) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1996&rollnumber=422>

On September 26, 1996, the Senate failed by to override the veto 58-40 http://www.senate.gov/legislative/vote1042/vote_00301.html

105th Congress:

On March 20, 1997, the House considered the Partial-Birth Abortion Ban Act (H.R.1122). After defeating a motion to recommit the bill with instructions (that would have gutted the ban) 149 - 282 (Roll no. 64) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1997&rollnumber=64> the House passed the ban 295-136 (Roll Call No.65 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1997&rollnumber=65>)

On May 20, 1997, the ban passed the Senate with amendments 64-36 http://www.senate.gov/legislative/vote1051/vote_00071.html

On October 8, 1997 the House agreed to the Senate amendments and passed the ban 296-132 (Roll no. 500 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1997&rollnumber=500>)

On October 10, 1997, the Partial-Birth Abortion Ban Act was vetoed by President Bill Clinton for the second time.

On July 23, 1998 the House overrode the President's veto 296-132 (Roll No. 325) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1998&rollnumber=325>

On September 18, 1998, the Senate failed by to override the veto 64-36 http://www.senate.gov/legislative/vote1052/vote_00277.html

106th Congress:

On April 5, 2000, the House considered the Partial-Birth Abortion Ban Act (H.R.3660). After defeating a motion to recommit the bill with instructions (that would have gutted the ban) 140-289 (Roll no. 103) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2000&rollnumber=103> the House passed the ban 287-141 (Roll Call No.104 <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2000&rollnumber=104>)

On October 21, 1999, the Senate considered the Partial-Birth Abortion Ban Act (S. 1692) and approved it with amendments 63-34 http://www.senate.gov/legislative/vote1061/vote_00340.html

On May 25, 2000, the House took up S. 1692 as amended, struck the entire text, inserted the House-passed text of H.R. 3660, passed the bill and requested a conference with the Senate. This passed by voice vote.

The Senate refused to go to conference with the House on the Partial-Birth Abortion Ban act, and the bill died at the end of the 106th Congress.

107th Congress:

July 24, 2002, the House considered the Partial-Birth Abortion Ban Act (H.R. 4965). After defeating a motion to recommit the bill with instructions (that would have gutted the ban) 187-241 (Roll no. 342)

<http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=342> the House passed the ban 274 - 151, 1 Present (Roll no. 343) <http://clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=343>

108th Congress:

March 12, 2003, the Senate considered the Partial-Birth Abortion Ban Act (S.3). The following amendment affirming *Roe v. Wade* was adopted 52-46:

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00048

SEC. 4. SENSE OF THE SENATE CONCERNING ROE V. WADE.

(a) FINDINGS.--The Senate finds that--

- (1) abortion has been a legal and constitutionally protected medical procedure throughout the United States since the Supreme Court decision in *Roe v. Wade* (410 U.S. 113 (1973)); and
- (2) the 1973 Supreme Court decision in *Roe v. Wade* established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy.

(b) SENSE OF THE SENATE.--It is the sense of the Senate that--

- (1) the decision of the Supreme Court in *Roe v. Wade* (410 U.S. 113 (1973)) was appropriate and secures an important constitutional right; and
- (2) such decision should not be overturned.

and the Senate passed the ban 64-33 with this one amendment.

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00051

(Note: Because of this controversial Sense of the Senate language, which is unrelated to the partial-birth abortion issue, it is expected the House will demand a conference committee with the Senate to remove extraneous provisions and send a clean ban to the President's desk.)

Other Resources: drawings of partial-birth abortion procedure: <http://www.nrlc.org/abortion/pba/diagram.html>

Background and talking points on partial-birth abortion: <http://www.nrlc.org/abortion/pba/index.html>

Why delivering a child in a breech (feet-first) position and puncturing the skull is not recommended medical practice for the "health" of the mother: <http://www.nrlc.org/abortion/pba/pbafact11.html> & <http://www.nrlc.org/abortion/pba/pbafact12.html>

Resources from physicians against partial-birth abortion. Physicians' Ad-hoc Coalition for Truth <http://www.geocities.com/CapitolHill/9707/>

Administration Position: During the March 2003 consideration of the ban in the Senate, the Administration released the following statement of policy:

The Administration strongly supports enactment of S. 3, which would ban an abhorrent procedure commonly known as partial-birth abortion. The bill is narrowly tailored and exempts those procedures necessary to save the life of the mother.

Partial-birth abortion is a late-term abortion procedure that is not accepted by the medical community. Approximately 30 States have attempted to ban it. The Administration strongly believes that enactment of S. 3 is both morally imperative and constitutionally permissible.

The Administration strongly opposes any amendment to the bill that would limit its application to a time after the child is determined to be viable, which could allow this procedure to be used as late as the fifth or sixth months of pregnancy, when most partial birth abortions are performed. The Administration supports the exception for procedures

necessary to save the life of the mother, but **strongly opposes any amendments to create additional exceptions because these exceptions may create open-ended loopholes and allow use of the procedure even in the third-trimester** (emphasis added).

[Note: the Senate amendments opposed by the Administration mirror what would likely be the gutting substitute and the motion to recommit offered in the House.]

Cost to Taxpayers: CBO estimates that implementing H.R. 760 would not result in any significant cost to the federal government. Because the bill would establish a new federal crime, there could be an increase in law enforcement, court proceedings, or prison operations costs, but CBO does not estimate a significant cost due to the low number of cases expected. Any fines collected from prosecutions would be deposited into the Crime Victims Fund.

Does the Bill Create New Federal Programs or Rules?: H.R. 760 would create a new federal crime under Title 18 of the U.S. Code for a physician to perform a partial-birth abortion (except to save the life of the mother), punishable by a fine and/or imprisonment for up to two years. A pregnant mother who undergoes a partial-birth abortion may not be prosecuted under H.R. 760.

Constitutional Authority: The Judiciary Committee (in Report No. 108-58) finds authority in Article I, Section 8, Clause 3 of the Constitution (commerce clause).

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